

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1569

To be argued by
NICHOLAS FIGUEROA

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1569

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL ALLEN FALLEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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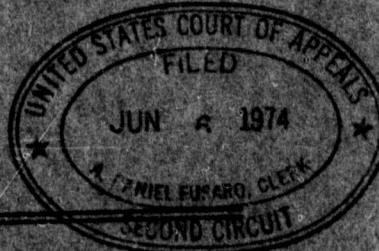
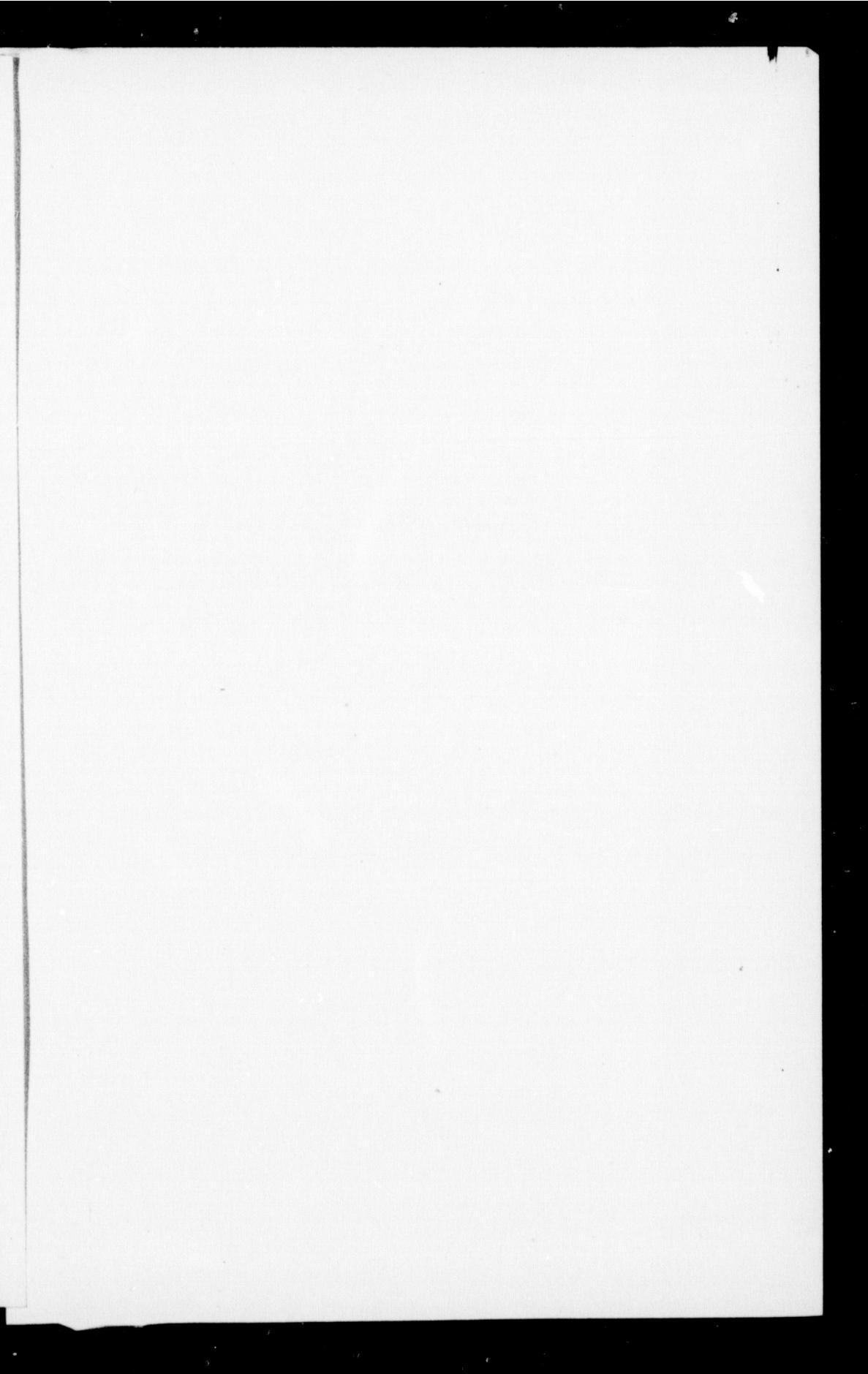


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UNITED STATES OF AMERICA,

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—v.—

MICHAEL ALLEN FALLEY,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Allen Falley appeals from a judgment of conviction entered May 1, 1974, in the United States District Court for the Southern District of New York following a four day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 73 Cr. 1059, filed November 23, 1973, charged Falley in one count with distribution of 3003.2 grams of marihuana in violation of Title 21, United States Code, Section 841.

Trial commenced on March 18, 1974, and concluded on March 20, when the jury found Falley guilty as charged.

On May 1, 1974, Judge Frankel sentenced Falley to two years imprisonment, to be followed by three years special parole.

Falley is presently serving his sentence, having failed to post the bail pending appeal fixed by order of this Court.*

Statement of Facts

A. The Government's Case

On October 2, 1973, David Stolzenberg* received a phone call from Michael Falley, a close friend for over a decade. Falley's reason for calling was to advise his friend that he had about 6 pounds of hashish available for sale at \$500 per pound. He asked Stolzenberg whether he was interested in selling the hashish or if he knew of anyone that might be interested (14). Stolzenberg replied he would make the necessary inquiries. Stolzenberg, who had been cooperating with the Drug Enforcement Administration since the previous month, informed Special Agent Fred Boff who advised him to feign interest.

Accordingly, when Falley phoned back the following morning he was told by Stolzenberg that he had found a prospective buyer for the hashish. Falley answered, "Fine. We will set it up for Thursday, October 4, in the morning." As a result of Stolzenberg's reporting this conversation to Agent Boff it was agreed that a recording would be made of Falley's scheduled call the following day. But instead

* Falley and his wife were convicted of similar offenses in the United States District Court for the Eastern District of New York, but their convictions were reversed by this Court. *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973). The offense tried in this District was committed by Falley while that case was *sub judice* in this Court, Falley being then at liberty on bail pending appeal.

* Stolzenberg was tried with Falley in the Eastern District prosecution and convicted. His conviction was separately affirmed by this Court. *United States v. Stolzenberg*, 493 F.2d 53 (2d Cir. 1974).

of phoning at 10:00 A.M. as agreed, Falley phoned at 9:30 A.M. and informed Stolzenberg of the terms of the sale. He disclosed that he was at Grand Central Station where he had cached in a coin-operated locker 6½ pounds of hashish which he would sell for \$550 a pound. After promising Stolzenberg a half pound of the hashish as a commission, Falley asked how soon he could transfer a commission, Falley asked how soon he could transfer the locker key to Stolzenberg (Tr. 18). Replying that his friend from Philadelphia had not arrived yet, Stolzenberg suggested that Falley call back between 10:00 and 10:30 A.M. A little later Stolzenberg left and met Agents Boff and Ronald Jordison in front of his apartment building and returned with them to his apartment. Shortly after entering the apartment the phone rang and was answered by Stolzenberg, who gestured to the agents that it was Falley. Hurriedly the agents attempted several times to attach a recording device to the phone which kept coming loose. Finally installed, it recorded most of a conversation during which Stolzenberg claimed that his friend from Philadelphia had arrived and would be in front of Grand Central Station at 11:00 A.M. ready to buy the hashish. Falley suggested instead that the three of them meet at the entrance to the Pan Am Building where he would transfer the key and await the \$3,300 payment after Stolzenberg and his friend had "checked the merchandise" (Tr. 20). Stolzenberg agreed and together with "his friend," Agent Jordison, drove to the vicinity of the Pan Am Building, where Stolzenberg was searched by Jordison and found to have three house keys in his pockets (Tr. 20). Walking towards the Pan Am Building they observed Falley seated on the steps of the building's entrance with his infant son. Stolzenberg greeted him and then introduced Agent Jordison as his friend Ronny. Still seated on the steps, Falley reached up and shaking hands with Jordison said, "Hello, good-bye, see you around the corner in a few minutes." Jordison, perplexed, glanced at Stolzenberg, then stared quizzically at Falley. Again Falley repeated, "Hello, goodbye. Go around the corner and we'll meet you in a few

minutes" (Tr. 21, 98). Agent Jordison walked away and, making a right turn at the building entrance, disappeared from Falley's view. Responding to Falley's question, Stolzenberg claimed he had seen the money and was then handed a key to a rental locker. Falley asked how long it would be before he was paid. Stolzenberg replied that he would return within a few minutes with the \$3,300 payment. Stolzenberg took the key from Falley and walked in the same direction he had seen Agent Jordison go and, meeting him, handed Jordison the key (Tr. 69). Following Falley's instructions, Stolzenberg escorted Agent Jordison to a row of rental lockers inside Grand Central Station. Jordison inserted the key into locker No. 6235 and opened the door. Reaching inside, Jordison pulled out a small shopping bag which he placed on the ground and looked into. Ascertaining that it contained hashish, he gave a prearranged signal to the surveilling agents who then arrested Falley, still seated on the steps and awaiting payment.

B. The Defendant's Case

Although Falley did not testify on his own behalf, he called various witnesses in an effort to prove that he had met with Stolzenberg merely to return a coat Stolzenberg had left at the Falley's Poughkeepsie home several months before (Tr. 239-272).

Marcia Stolzenberg, the former wife of the prosecution's principal witness, was called as a witness and identified the coat as having belonged to her former husband (Tr. 242). Steve Wittels was then called to the stand and testified that on the day of Falley's arrest he had driven him into the city and Falley had had a package with him (Tr. 247).

Janet Falley, appellant's wife, testified that on the day of her husband's arrest she had put David Stolzenberg's coat into a shopping bag so that it could be returned by her husband (Tr. 254). She also testified that the next occa-

sion on which she saw the coat was several hours prior to her testimony as a result of serving a subpoena on the Unclaimed Property Office of the coin-operated locker company located at Grand Central Statiaon (Tr. 251-253). She also brought back with her a specimen locker key in order to demonstrate that the key was of a different color than that testified to by the government witnesses (Tr. 255-257). During her cross-examination she admitted not knowing when the coat was placed in the locker (Tr. 258-259).

Sonja Falley, appellant's mother, testified that at noon on the day of her son's arrest she had an appointment to meet him for lunch near the place where he was arrested (Tr. 270-272).

Also called as defense witnesses were three Special Agents of the Drug Enforcement Administration who had participated in Falley's arrest (Tr. 195-236).

ARGUMENT

The Appellant's Contentions Are Without Substantial Merit.

Falley claims that the trial court erred in refusing to grant his motion to dismiss the indictment because of the Government's inability to produce the key to the rental locker in which Falley had stored the hashish. He argues that since his guilt depended primarily on whether he transferred the key to Stolzenberg it was a vital piece of evidence and consequently the Government's unfulfilled promise to produce the key at trial mandates reversal of his conviction. This contention is frivolous.

Counsel never arranged for pre-trial inspection of the key which it now claims was a vital piece of evidence.* Had they done so it is difficult to perceive the "exculpatory tests" they currently claim could have been made. The evidence at trial indicated that the key was one of thousands available in Grand Central Station and that it was necessary to reinsert it into its receptacle in order to gain access to the hashish inside the locker. Falley's added conjecture that had the Grand Jury been aware of the missing key it might not have indicted is, at best, logically unsupportable.

Falley also claims that the indictment should have been dismissed because of the use of improper hearsay before the Grand Jury. That claim was not raised below, despite the fact that the Grand Jury testimony was turned over to the defense as 3500 material, and consequently the claim may not be asserted now. *Davis v. United States*, 411 U.S. 233 (1973). Moreover, Agent Jordison, who testified before the Grand Jury, had participated in the transaction with Stolzenberg and Falley, as well as overhearing their final telephone conversation setting up the rendezvous. This is hardly the situation which confronted this Court in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). That portion of Jordison's testimony which recounted conversations between Stolzenberg and Falley alone, either on the telephone or when Falley gave Stolzenberg the locker key, was adequately identified as hearsay by the form of the questions and answers. See *United States v. Ramirez*, 482 F.2d 807, 811-812 (2d Cir. 1973).

Falley claims that since Stolzenberg worked on many cases as a Government informant he must have given the

* The Government did say in its pretrial papers that it would permit Falley to inspect the key, the Assistant United States Attorney being unaware that the agent had not retained it after opening the locker with it.

Government many statements. Consequently he claims he should have been given these statements under Section 3500, even though he makes no claim that they related in any way at all to the transaction between Stolzenberg and Falley charged in the indictment. The very case Falley relies on establishes that these statements did not have to be turned over. *United States v. Pacelli*, 491 F.2d 1108, 1119-1120 (2d Cir. 1974). While Falley also claims improbably that these statements by Stolzenberg in other cases where he acted as an informant may have contained material producible under *Brady v. Maryland*, 373 U.S. 83 (1963), even now he makes no suggestion whatsoever of what kind of exculpatory material he claims the Government did not disclose. See *United States v. Brauer*, 367 F. Supp. 156, 169-171 (S.D.N.Y. 1973), *aff'd*, Dkt. No. 72-2199 (2d Cir., May 3, 1974).

Falley's claim that his right of confrontation under the Fifth Amendment was curtailed by the Trial Court's restriction of his cross-examination of the Government chemist is completely unsupported by the record (Tr. 188-192). The Government's sole objection during Falley's cross-examination of the chemist was overruled, and his remaining interrogation of the chemist continued completely unobstructed. Equally without merit is Falley's claim that the trial court abused its discretion in refusing to make the marihuana available to him before trial for testing to determine whether it was the type of cannabis forbidden by the statute. Section 812 of Title 21 includes any kind of marihuana without limitation as to type, and therefore even if the marihuana had been of the strain Falley claims it might have been, Falley would have had no defense to the indictment on that ground. *United States v. Rothberg*, 480 F.2d 534, 536 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1973).

Falley claims that Judge Frankel denied him the right to put certain witnesses he had subpoenaed on the stand to test their claim that they would refuse to testify and assert

their Fifth Amendment privilege (See Tr. 216-225). The contention is absolutely frivolous. Certainly Falley is correct that he had the right to test the claim of the two witnesses by requiring them to assert their Fifth Amendment privilege from the stand. *United States v. Sanchez*, 459 F.2d 100 (2d Cir.), cert. denied, 409 U.S. 864 (1972). However, when these witnesses, either directly or through counsel, advised Judge Frankel that they would assert their Fifth Amendment privilege to the questions Falley proposed to ask them, hardly an unreasonable position for them to take since both were under indictment in the Southern District of New York, Judge Frankel specifically offered the defense an opportunity to call the witnesses to the stand to make sure that they would assert the privilege, and the defense declined his offer as to both witnesses (Tr. 220, 225). Moreover, the testimony which Falley said that he wished to elicit from the two witnesses would have clearly been inadmissible (Tr. 218-219, 222).

Falley assigns error to a further multitude of the Trial Court's decisions. Among them he claims that the Court's denial of his motion for a continuance was unreasonable and constituted a denial of his constitutional right to counsel of his own choosing. He also ascribes error to the Court's refusal to hold a hearing on his motion to suppress the record made of his phone conversation with Stolzenberg on the grounds that, notwithstanding the Stolzenberg's consent, it was unauthorized by Court order. He also claims that the denial by the Court of his request pursuant to the Criminal Justice Act to be provided with a private investigator and furnished with daily copy of the trial transcript constituted a denial of due process because it was inconsistent with the Court's prior assignment to him of counsel under that Act, and especially because he was handicapped by acting as his counsel. These contentions are frivolous.

During the week prior to the scheduled trial date of March 18, 1974, Falley, in an attempt to obtain an adjournment, personally delivered to the trial judge's chambers an

affidavit of actual engagement from attorney Raphael Koenig requesting an adjournment of the Falley trial so that he could represent Falley. At the time this request was made, and even up to the present time on appeal, no reasons have been set forth for Falley's rejection of assigned counsel other than bare desire by Falley to change attorneys. Therefore judged by the "reasons disclosed at the time the motion was heard" the trial Court's denial of the motion was well within its discretion. *United States v. Ellenbogen*, 365 F.2d 982 (2d Cir. 1966), cert. denied, 381 U.S. 923 (1967). See also *United States v. DiStefano*, 464 F.2d 845, 846 n. 1 (2d Cir. 1972). Since five months had elapsed since Falley's arrest in October, and since he had applied for and secured a Court-appointed attorney several months prior to the scheduled trial date his application was properly denied. *United States v. Maxey*, Dkt. No. 73-1770 (2d Cir., May 28, 1974).

Falley's contention that he was entitled to a suppression hearing concerning his recorded conversation with Stolzenberg is equally unavailing. His argument that a Court order was required to permit recording of the conversation is frivolous, *United States v. Bonanno*, 487 F.2d 654 (2d Cir. 1973), in view of the evidence at trial, *United States v. Caniesio*, 470 F.2d 1224, 1226 (2d Cir. 1972), that Stolzenberg had authorized the recording of his conversation with Falley.

The reasons advanced by Falley in support of his right to the services of a private detective and daily copy of the trial transcript are also without merit. Assistance to a defendant under Section 3006A(e) is subject to the discretion of the District Court. *United States v. Brown*, 443 F.2d 659 (D.C. Cir. 1970); *United States v. Washabaugh*, 442 F.2d 1127, 1130 (9th Cir. 1971). There is no showing made that Judge Frankel abused his discretion here.

CONCLUSION

The judgment of conviction should be affirmed.*

Respectfully submitted,

PAUL J. CURRAN,

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* We feel obliged respectfully to draw to the Court's attention that this brief is being filed on Thursday, June 6, 1974, the Government having been served with an *amicus curiae* brief on Monday, June 3, and with appellant's brief at 7:00 P.M. on Tuesday, June 4. Oral argument is fixed for June 7. We believe that the amount of time allowed us for the preparation of this brief has deprived us of the opportunity to give the Court the kind of brief that the Court has the right to expect.

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Nicholas Figueroa being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 7 day of *June, 1974*
he served a copy of the within *Brief*
by placing the same in a properly postpaid franked
envelope addressed:

Victor Breszel, Esq
507 Fifth Ave
NY NY 10017

Irving Anobile, Esq
225 Broadway
NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing to the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Nicholas Figueroa

Sworn to before me this

7 day of *June, 1974*
Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975